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VIA EMAIL & U.S. MAIL

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October 5, 2017

Juan Fajardo, Esq.
Office of Regional Counsel
New Jersey Superfund Branch
U.S. Environmental Protection Agency, Region 2
290 Broadway
17th Floor
New York, NY 10007-1866

Re: Diamond Alkali Superfund Site – OU2 Allocation and Cash-Out Settlement Process

Dear Mr. Fajardo:

I represent Berol Corporation ("Berol") (successor by merger to Faber-Castell Corporation ("Faber")), Goody Products, Inc. ("Goody"), and their parent, Newell Brands Inc. (f/k/a Newell Rubbermaid Inc.) ("Newell") (together the "Companies") in connection with the Lower Passaic River ("LPR"), an operable unit of the Diamond Alkali Superfund Site ("Site").[1] EPA's September 18, 2017, letter concerning the allocation and second round cash-out process for the March 2016 Record of Decision ("ROD") for Operable Unit 2 ("OU2") prompted some concerns for the Companies. I write to express those concerns and offer a recommendation that could help ensure that the allocation and settlement process is fair, transparent and efficient.

First, a little background on Berol and Goody. Neither company discharged dioxins, furans or polychlorinated biphenyls ("PCBs") to the LPR. Additionally, it is unlikely they are responsible for *any* of the other contaminants of concern ("COCs") identified in the ROD that are present in LPR sediments. There is no evidence that Berol (or Faber) disposed of or released any COC to the LPR. While Goody may have generated certain COCs from its operations, Goody's scientific expert has concluded that it would have been highly unlikely for any such COCs (or any other substance, for that matter) to have ever reached the LPR. We have provided further details concerning these former facilities and their alleged nexus to the LPR in prior correspondence.[2]

[1] EPA has issued notice letters to Berol with respect to a former Faber-Castel Corporation facility, and to Newell with respect to a former Goody facility. EPA has not issued a notice letter to Goody. Newell, itself, had no role in connection with either the Faber or Goody facility, or any other facility with alleged discharges to the Site.

[2] *See, e.g.*, April 12, 2017 letter from A. Sawula to J. Fajardo.

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In letters and other communications since March 2017, EPA has consistently indicated that it intends to offer cash-out settlements to parties who are not responsible for the discharge of dioxins, furans or PCBs to the LPR, while parties who are responsible for such discharge would be expected to implement or fund the selected remedy. I understand, based on EPA's September 18 letter, that to address concerns raised by some parties who may be expected to perform the remedy, the allocation will now include all parties (with a few notable exceptions) and not just parties who may be eligible for cash-out settlement.

The Companies appreciate EPA's decision that a single allocation process will allow for an allocator to help identify, in a transparent and informed manner, which parties are eligible for settlement and which should implement or fund the remedy. However, in its September 18th letter, EPA says that it will make a decision regarding cash-out settlement offers "[a]fter the allocator assigns shares to the parties." It is unclear if this means the allocator would determine a final individual share for all participating PRPs prior to EPA offering any cash-out settlements. If it does, the patently unfair result would be an unreasonable delay of cash-out settlements, including for parties who contributed no COCs to the LPR. Unnecessary and inequitable transaction costs would be borne by *de micromis* and *de minimis* parties, in direct opposition to Section 122(g) of CERCLA and EPA's settlement policies. Indeed, for such parties the transaction costs of involvement in a lengthy and expensive allocation process might exceed the party's ultimate responsibility for any reasonable share of the remedial cost. Such a process could also unreasonably delay the Remedial Action for OU2.

To avoid unfairness and unreasonable delay, we suggest an allocation process that begins by dividing participating PRPs into three groups:

1. Group 1: Parties who are the same as, or substantially similar to, the parties included in EPA's initial cash-out settlement offers. This would include parties who contributed no COCs to the LPR and parties who, based on remoteness or the nature of their discharges, likely had no COCs that reached or would currently be present in the LPR.

2. Group 2: All other parties who released the COCs other than dioxins, furans or PCBs to the LPR.

3. Group 3: Parties who released dioxins, furans or PCBs to the LPR.

The allocator can then work on determining individual share allocations within each group, in turn. Ultimately, settlement for parties who fall within the first or second groups should not be delayed pending individual allocation determinations for parties falling within the third group. This would address EPA's statement from the September 18th letter that it appreciates the concerns of numerous parties that "financial burden . . . placed on PRPs that are not responsible for the release of dioxins, furons and/or [PCBs] into the Lower Passaic River if those parties are not given the opportunity to settle with the United States . . . ."

I request that EPA please share this letter with Mr. Batson, if permissible. An allocation process utilizing the structure and principles set forth in this letter will allow for a transparent and fair allocation process that avoids unfair and unnecessary delays and costs to all involved parties.

Sincerely,

Andrew N. Sawula

cc: Eric Schaaf, Esq., USEPA
Sarah P. Flanagan, Esq., USEPA
Eric J. Wilson, USEPA